DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

June 4, 1997

**MEMORANDUM**

TO : OCR Regional Managers
and
ACF Regional Administrators

FROM : Dennis Hayashi
Director, Office for Civil Rights
and
Olivia Golden
Principal Deputy Assistant Secretary
Administration for Children and Families

SUBJECT : Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996

On August 20, 1996, President Clinton signed the Small Business Job Protection Act of 1996. Section 1808 of the Act is entitled "Removal of Barriers to Interethnic Adoption." The section affirms and strengthens the prohibition against discrimination in adoption or foster care placements. It does this by adding to title IV-E of the Social Security Act a State Plan requirement and penalties which apply both to States and to adoption agencies. In addition, it repeals Section 553 of the Multiethnic Placement Act (MEPA), which has the effect of removing from the statute the language which read "Permissible Consideration -- An agency or entity [which receives federal assistance] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child."

Congress has now clarified its intent to completely eliminate delays in placement where they were in any way avoidable. Race, culture or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement.

The Interethnic Adoption provisions maintain a prohibition against delaying or denying the placement of a child for adoption or foster care on the basis of race, color, or national origin of the adoptive or foster parent, or the child involved. They further add a title IV-E State Plan requirement which also prohibits delaying and denying foster and adoptive placements on the basis of race, color or national origin.

The provisions also subject States and entities receiving Federal funding which are not in compliance with these title IV-E State plan requirements to specific graduated financial penalties (in cases in which a corrective action plan fails to cure the problem within six months). ACF staff and OCR staff are working to develop

a common protocol for determining compliance with these Interethnic Adoption provisions, as well as policy and procedures for ACF to use in applying the title IV-E requirements, developing corrective action plans and imposing penalties.

As a first step in implementing the new title IV-E State Plan requirement and the associated penalties, ACF expects to amend certain of its child welfare reviews to screen for compliance with MEPA and the Interethnic provisions. ACF will begin preliminary documentation of MEPA compliance during fiscal year 1997, while completing the work on formal review standards and protocols, which will be published as proposed regulations. States which are determined to be out of compliance will be engaged in corrective action planning immediately. The penalties imposed by the statute are graduated, and vary according to the State population and the frequency and duration of noncompliance. The Department has estimated that State penalties could range from less than $1,000 to more than $3.6 million per quarter, and penalties for continued noncompliance could rise as high as $7 million to $10 million in some States.

The Office for Civil Rights will continue to receive and investigate complaints related to MEPA, and in addition will conduct independent reviews to test compliance within the States. The Administration for Children and Families will also conduct reviews which focus on or include tests of MEPA compliance. The two HHS agencies will use the common protocol and review standards in order to assure uniform application of the statute, and equitable and effective enforcement.

The Congress has retained section 554 of MEPA, which requires that child welfare services programs provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed. This is the section that requires States to include a provision for diligent recruitment in their title IV-B State Plans. The diligent recruitment requirement in no way mitigates the prohibition on denial or delay of placement based on race, color or national origin.

Set forth below is the language of the new provision. Key terms contained in MEPA that have been eliminated are shown, but struck.

> A person or government that is involved in adoption or foster care placements may not--(a) [~~categorically~~] deny to any individual the opportunity to become an adoptive or a foster parent, [~~solely~~] on the basis of the race, color, or national origin of the individual, or of the child involved; or (B) delay or deny the placement of a child for adoption or into foster care [~~or otherwise discriminate in making a placement decision, solely~~] on the basis of the race, color, or national origin of the

adoptive or foster parent, or the child, involved.

HHS civil rights and child welfare policies already prohibit delay or denial on the basis of race, color or national origin. Those policies have been developed according to a strict scrutiny standard, and are further supported by the language of the Interethnic Placement provisions. The effect of the elimination from the statute of the words "categorically," "solely," and "or otherwise discriminate in making a placement decision, solely" is to clarify that it is not just categorical bans against transracial placements that are prohibited. Rather, these changes clarify that even where a denial is not based on a categorical consideration, which is prohibited, other actions that delay or deny placements on the basis of race, color or national origin are prohibited.

The repeal of MEPA's "permissible consideration" confirms that the appropriate standard for evaluating the use of race, color or national origin in adoption and foster care placements is one of strict scrutiny. In enacting MEPA, Congress prohibited actions that violated the rigorous constitutional strict scrutiny standard. That standard is reflected in the provision establishing that a violation of MEPA is deemed a violation of Title VI. Title VI itself incorporates the strict scrutiny standard. The Department's published MEPA guidance stressed that standard, stating unequivocally that "rules, policies, or practices that do not meet the constitutional strict scrutiny test would . . . be illegal."

Notwithstanding that guidance, after passage of MEPA, some had argued that the permissible consideration language allowed States to routinely take race into account in making placement decisions. This Department had never taken that view because it would be inconsistent with a strict scrutiny standard. Congress' repeal of the permissible consideration language removes the basis for any argument that such a routine practice would be permissible and reinforces the HHS position. Elimination of that language, however, does not affect the imposition of the strict scrutiny standard. As it had under MEPA, Congress included a general nondiscrimination provision in the new law and connected violations of that provision to violations of Title VI. The changes made in the law strengthened it by removing areas of potential misinterpretation and strengthening enforcement while continuing to emphasize the importance of removing barriers to the placement of children. In that area, as noted below, "the best interests of the child" remains the operative standard in foster care and adoptive placements.

The Department's policy in this delicate area is guided by a number of complementary statutory provisions:

1) From the perspective of civil rights law, the strict scrutiny standard under Title VI, the Interethnic Adoption provisions and the U.S. Constitution forbid decision making on

the basis of race or ethnicity except in the very limited circumstances where such consideration would be necessary to achieve a compelling governmental interest. The only compelling governmental interest related to child welfare that has been recognized by courts is protecting the "best interests" of the child who is to be placed. Additionally, the consideration must be narrowly tailored to advance the child's interests, and must be made as an individualized determination for each child.

2) From the standpoint of child welfare legislation, Public Law 96-272, the child welfare reform legislation passed in 1979, applied the "best interests of the child" standard to judicial determinations regarding removal of children into foster care as a condition of eligibility for federal financial participation under title IV-E of the Social Security Act (the Act). The best interests standard is a common provision of State laws regarding child welfare and domestic matters. Title IV-B of the Act requires States to act in the best interests of children, and, in their State Child and Family Services Plans to "provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed." In addition to providing for determinations regarding the best interests of the child, State Plans under title IV-E of the Act are required to provide "that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards."

Consistent with the intent of the new law and the constitutional standard, it would be inappropriate to try to use the constitutional standard as a means to routinely consider race and ethnicity as part of the placement process. Any decision to consider the use of race as a necessary element of a placement decision must be based on concerns arising out of the circumstances of the individual case. For example, it is conceivable that an older child or adolescent might express an unwillingness to be placed with a family of a particular race. In some states older children and adolescents must consent to their adoption by a particular family. In such an individual situation, an agency is not required to dismiss the child's express unwillingness to consent in evaluating placements. While the adoption worker might wish to counsel the child, the child's ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child's willingness to accept the family as an element that is critical to the success of the adoptive placement. At the same time, the worker should not dismiss as possible placements families of a particular race who are able to meet the needs of the child.

Other circumstances in which race or ethnicity can be taken into account in a placement decision may also be encountered. However it is not possible to delineate them all. The strict scrutiny standard exists in part because the law cannot anticipate in advance every factual situation which may present itself. However, the primary message of the strict scrutiny standard in this context is that only the most compelling reasons may serve to justify consideration of race and ethnicity as part of a placement decision. Such reasons are likely to emerge only in unique and individual circumstances. Accordingly, occasions where race or ethnicity lawfully may be considered in a placement decision will be correspondingly rare.

ACF has issued an Information Memorandum (ACYF-IM-CB-96-24, dated November 14, 1996, attached) which provided the States with basic information about the Interethnic Adoption provisions and about other legislative changes which directly affect adoptive and foster placements, including the new requirement in title IV-E that States shall consider relatives as a placement preference for children in the child welfare system.

Much has already been accomplished through our joint efforts to implement MEPA. These efforts to date have focused on the importance of four critical elements:

1) Delays in placing children who need adoptive or foster homes are not to be tolerated, nor are denials based on any prohibited or otherwise inappropriate consideration;

2) Discrimination is not to be tolerated, whether it is directed toward adults who wish to serve as foster or adoptive parents, toward children who need safe and appropriate homes, or toward communities or populations which may heretofore have been under-utilized as a resource for placing children;

3) Active, diligent, and lawful recruitment of potential foster and adoptive parents of all backgrounds is both a legal requirement and an important tool for meeting the demands of good practice; and

4) The operative standard in foster care or adoptive placements has been and continues to be "the best interests of the child." Nevertheless, as noted above, any consideration of race, color or national origin in foster or adoptive placements must be narrowly tailored to advance the child's best interests and must be made as an individualized determination of each child's needs and in light of a specific prospective adoptive or foster care parent's capacity to care for that child.

Protection of activities associated with adoption and foster care from discriminatory practices is a major priority for HHS.

Questions regarding this memorandum should be directed to Kathleen O'Brien in the Office for Civil Rights at (202) 619-0403 or Michael Ambrose in the Children's Bureau at (202) 205-8740.

Attachment

(d) STUDY AND REPORT.—The Secretary of the Treasury shall study the effect on adoptions of the tax credit and gross income exclusion established by the amendments made by this section and shall submit a report regarding the study to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives not later than January 1, 2000. 26 USC 23 note

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1996.

**SEC. 1808. REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION.**

(a) STATE PLAN REQUIREMENTS.—Section 471(a) of the Social Security Act (42 U.S.C 671(a)) is amended—

(1) by striking "and" at the end of paragraph (16);

(2) by striking the period at the end of paragraph (17) and inserting "; and"; and

(3) by adding at the end the following:

"(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

"(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

"(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.".

(b) ENFORCEMENT.—Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

"(d)(1) If, during any quarter of a fiscal year, a State's program operated under this part is found, as a result of a review conducted under section 1123A, or otherwise, to have violated section 471(a)(18) with respect to a person or to have failed to implement a corrective action plan within a period of time not to exceed 6 months with respect to such violation, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1123A(b)(3), the Secretary shall reduce the amount otherwise payable to the State under this part, for that fiscal year quarter and for any subsequent quarter of such fiscal year, until the State program is found, as a result of a subsequent review under section 1123A, to have implemented a corrective action plan with respect to such violation, by—

"(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding for the fiscal year with respect to the State;

"(B) 3 percent of such otherwise payable amount, in the case of the 2nd such finding for the fiscal year with respect to the State; or

"(C) 5 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding for the fiscal year with respect to the State.

In imposing the penalties described in this paragraph, the Secretary shall not reduce any fiscal year payment to a State by more than 5 percent.

"(2) Any [illegible] er entity which is in a State that receives funds [illegible] and which violates section 471(a)(18) during a fiscal year quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.



"(3)(A) Any individual who is aggrieved by a violation of section 471(a)(18) by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

"(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

"(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.".

42 USC 1996b.

(c) CIVIL RIGHTS.—

(1) PROHIBITED CONDUCT.—A person or government that is involved in adoption or foster care placements may not—

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) ENFORCEMENT.—Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964.

(3) NO EFFECT ON THE INDIAN CHILD WELFARE ACT OF 1978.—This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(d) CONFORMING AMENDMENT.—Section 553 of the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. 5115a) is repealed.

26 USC 6302 note.

**SEC. 1809. 6-MONTH DELAY OF ELECTRONIC FUND TRANSFER REQUIREMENT.**

Notwithstanding any other provision of law, the increase in the applicable required percentages for fiscal year 1997 in clauses (i)(IV) and (ii)(IV) of section 6302(h)(2)(C) of the Internal Revenue Code of 1986 shall not take effect before July 1, 1997.

## Subtitle I—Foreign Trust Tax Compliance

**SEC. 1901. IMPROVED INFORMATION REPORTING ON FOREIGN TRUSTS.**

(a) IN GENERAL.—Section 6048 (relating to returns as to certain foreign trusts) is amended to read as follows:

**"SEC. 6048. INFORMATION WITH RESPECT TO CERTAIN FOREIGN TRUSTS.**

"(a) NOTICE OF CERTAIN EVENTS.—

"(1) GENERAL RULE.—On or before the 90th day (or such later day as the Secretary may prescribe) after any reportable event, the responsible party shall provide written notice of such event to the Secretary in accordance with paragraph (2).

"(2) CONTENTS OF NOTICE.—The notice required by paragraph (1) shall contain such information as the Secretary may prescribe, including—